IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES BENEDICT STOCKHOLD, Appellant.	No. 38207-5-II UNPUBLISHED OPINION

Van Deren, C.J. — James Stockhold appeals his convictions for violating a domestic violence court order, intimidating a witness, and fourth degree assault. He argues that the trial court erred in admitting the victim's hearsay statements under the excited utterance exception to the hearsay rule. In his Statement of Additional Grounds for Review (SAG), Stockhold argues that (1) the prosecutor withheld evidence favorable to the defense, (2) his counsel was ineffective, and (3) the trial court erred in not ordering a mistrial. RAP 10.10. Because the victim was still under the influence of the startling event, we hold that the trial court did not abuse its discretion in admitting her statements under the excited utterance exception to the hearsay rule. We also hold that Stockhold's SAG issues are without merit. Thus, we affirm.

FACTS

Kimberly Temons had a no-contact protection order against Stockhold and was a

prospective witness in a criminal case against him in Steilacoom Municipal Court. Stockhold and Temons had dated for several years but their relationship ended one to two years prior to 2008.

On the morning of February 26, 2008, Stockhold went to Temons's house to collect his belongings. Temons testified that the two began to argue, Stockhold hit her several times, and threatened to hurt her if she testified against him in the pending criminal case. Temons attempted to call 911 but discovered that her telephone was disconnected so that she was unable to make outgoing calls. Temons took a knife from the kitchen, went outside, and scratched the letters "DV" into Stockhold's vehicle. Report of Proceedings (RP) at 85.

After Stockhold left, Temons drove to her workplace because she was unable to contact her employer by telephone concerning her injuries. When Temons's co-workers saw her injuries, they urged her to seek medical attention. She arrived at the hospital around 9:52 am and told a nurse that her former boyfriend had assaulted her. The nurse noted in her medical report that the incident occurred about 30 minutes earlier and that a former boyfriend had caused the injuries.

Medical personnel called the police. Steilacoom Police Detective Mark Rettig responded to the call, observed Temons's injuries, and spoke with her about the altercation. Rettig testified that, when he interviewed Temons at the hospital, "[s]he was fearful, crying, sobbing, tears out of both eyes, mucus coming out of the nose. Just very visibly scared, upset." RP at 101. The State charged Stockhold with violating a domestic violence court order by assault (count I), intimidating a witness (count II), fourth degree assault (count III), and three counts of violation of a no-contact order (counts IV, V, and VI).

The trial court permitted Rettig to testify about Temons's statements to him under the excited utterance exception to the hearsay rule, ER 803(a)(2). Rettig recounted Temons's

interview where she told him that Stockhold assaulted her, that the assault lasted 15 to 20 minutes, that Stockhold accused Temons of seeing other men, and that Stockhold told her that he would hurt her if she testified against him in the Steilacoom Municipal Court matter.

The emergency room triage nurse also testified at trial. The trial court admitted the nurse's medical report describing the incident as Temons related it. Temons told the jury that she suffers from post traumatic stress disorder (PTSD) and identified Stockhold as her assailant.

The jury found Stockhold guilty of the counts of violating a domestic violence court order, intimidating a witness, and fourth degree assault. The jury found him not guilty of the three counts of violation of a no-contact order. The trial court sentenced him to 36 months' confinement. He appeals.

ANALYSIS

I. Excited Utterance Exception—ER 803(a)(2)

Stockhold maintains that the trial court abused its discretion in admitting the statements Temons made to Rettig under the excited utterance exception to the hearsay rule. We disagree.

A. Standard of Review

We review a trial court's determination of whether a statement falls under the excited utterance exception for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, we will not disturb the trial court's ruling unless "no reasonable judge would have made the same ruling." *Thomas*, 150 Wn.2d at 854.

B. Hearsay Exception

Hearsay statements are admissible under the excited utterance exception if they are (1) related "to a startling event or condition" and (2) "made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2); *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). The statement must be made while the declarant is still under the influence of external physical shock and has not had time to "calm down enough to make a calculated statement based on self-interest." *Hardy*, 133 Wn.2d at 714. The declarant must be so "'under the influence of the event . . . that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (alteration in original) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Courts generally consider the amount of time between the event and when the statement is made and the declarant's observable level of emotional stress when the statement is made. *See, e.g.*, *Strauss*, 119 Wn.2d 416-17. "The passage of time alone, however, is not dispositive." *Strauss*, 119 Wn.2d at 417.

In *Strauss*, our Supreme Court held that a rape victim was still under the influence of the incident when she made the statement even though more than three hours had passed. The victim appeared to be in a state of shock; the officer described the victim as "very distraught, very red in the face and crying." *Strauss*, 119 Wn.2d at 416. Similarly, a statement made in a record that indicated a range of six to seven hours after an event can still be an excited utterance where the declarant is still under the stress of that event. *State v. Thomas*, 46 Wn. App. 280, 282, 284, 730 P.2d 117 (1986), *aff'd*, 110 Wn.2d 821; *State v. Flett*, 40 Wn. App. 277, 279, 287, 699 P.2d 774

(1985).

On the other hand, in *State v. Dixon*, 37 Wn. App. 867, 869-70, 873-74 684 P.2d 725 (1984), a victim's three and one half page written statement was held to be erroneously admitted under the excited utterance exception when the victim had been calmed by the police over a period of two hours as she wrote the statement. Even though the declarant was described as "'upset'" when she prepared the detailed, complete written description of the event, Division One of our court held that there was "no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance" and that there was no indication that the declarant's "ability to reason, reflect, and recall pertinent details was in any way impeded." *Dixon*, 37 Wn. App. at 874.

In *Flett*, the trial court did not abuse its discretion in admitting, as an excited utterance, a victim's statement made after the victim went to work following the assault on her and around six hours passed before the victim made the statement later admitted at trial. 40 Wn. App. at 279, 287. Similarly, a hearsay statement was admissible under the excited utterance exception after 45 minutes passed when the victim was "'whimpering, like crying almost,'" "'very emotional, very distraught, clearly upset and in a lot of pain.'" *State v. Woods*, 143 Wn.2d 561, 599, 23 P.3d 1046 (2001) (quoting *Woods* RP at 2899). In *Strauss* and *Flett*, the record reflected the continuing stress experienced and exhibited by the victim.

Here, it is unclear how much time passed between the altercation and Temons's statements to Rettig at the hospital. The record reflects that Temons arrived at the hospital around 9:52 am and that the altercation took place earlier that same morning. The nurse's notes state that the altercation took place about 30 minutes before Temons arrived at the hospital.

Temons told Rettig that the assault lasted approximately 15 to 20 minutes. The record is clear that some time elapsed in between the altercation and the hospital visit because Temons stopped at her place of employment.

But, unlike the victim in *Dixon*, Temons was more than merely upset. Rettig testified that "[s]he was fearful, crying, sobbing, tears out of both eyes, mucus coming out of the nose. Just very visibly scared, upset." RP at 101. This evidence shows that Temons remained under the influence of the event, even though the record is somewhat unclear about exactly how much time had elapsed since the altercation. We hold that the trial court did not abuse its discretion in admitting Temons's statements to Rettig.[1]

II. Sag Issues

A. Prosecutor Disclosure

Stockhold appears to argue that the prosecutor violated RPC 3.8(d)[2] when he failed to timely disclose to the defense evidence that negates his guilt. He alleges that, because Temons grabbed a kitchen knife during the altercation and admitted to suffering from PTSD, the

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[1] Even if we were to find an abuse of discretion, any error was harmless. Temons testified and described facts consistent with Stockhold assaulting her. And Temons's medical records, obtained in the course of her medical treatment, stated that a former boyfriend assaulted her. Thus, other persuasive evidence supported the jury's finding that Stockhold assaulted Temons.

[2] Prosecutors must

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

RPC 3.8(d).

prosecutor should have disclosed all doctors' reports. Stockhold's argument fails.

Nothing in the record suggests that Stockhold did not know that Temons suffered from PTSD until she testified. Moreover, even if he was unaware of her condition, Stockhold provides no authority suggesting that a victim's PTSD negates an assailant's guilt.

Furthermore, we do not review allegations that an attorney has violated the Rules of Professional Conduct. That is left to the Washington State Bar Association and our Supreme Court. Because there is no record or authority to support Stockhold's argument, this argument fails.

B. Ineffective Assistance of Counsel

Stockhold next argues that his counsel was ineffective for failing to properly investigate his case and in "fail[ing] to preserve the right to object to witness misconduct." SAG at 17. But Stockhold does not identify what information was not investigated, other than Temons's PTSD—which we deal with separately—nor does he identify witness misconduct. Thus, any information on these claims is outside the record on appeal and nothing in the record suggests that his counsel failed to investigate relevant issues pertaining to his case or that any witness engaged in misconduct. We do not review these issues.

C. Motion for Mistrial

Finally, Stockhold argues that the trial court abused its discretion by denying a motion for mistrial, alleging that a mistrial was warranted when Temons allegedly hugged a domestic violence advocate after leaving the witness stand. But the record does not reflect that Stockhold made a motion for a mistrial and it does not reflect that Temons embraced anyone in the courtroom or, if she did, that Stockhold objected to such a display or brought it to the trial

court's attention.[3] Stockhold's argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Bridgewater, J.

[3] Stockhold offers his handmade sketches of Temons and a victim advocate embracing in his SAG. On direct appeal we do not consider facts outside the record. *See* RAP 9.1(a).